No. 794.

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT.

THE NEVADA NATIONAL BANK OF SAN FRANCISCO, a National Banking Association, *Appellant*,

vs.

WASHINGTON DODGE, as Assessor of the City and County of San Francisco, State of California, and

JOSEPH H. SCOTT, as Tax Collector of said City and County,

Appellees.

Appellant's Points and Authorities.

T. I. BERGIN,
Counsel for Appellant.

Bosqui Eng. & Print. Co., 523 Clay St., S. F., Cal.

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT,

NORTHERN DISTRICT OF CALIFORNIA.

THE NEVADA NATIONAL BANK OF SAN FRANCISCO, a National Banking Association, *Appellant*, vs. WASHINGTON DODGE, as Assessor of the City and County of San Francisco, State of California, and JOSEPH H. SCOTT, as Tax Collector of said City and County, *Appellees.*	No. 794.

APPELLANT'S POINTS AND AUTHORITIES.

STATEMENT OF THE CASE.

This case presents the question of the constitutionality of the Act of March 14, 1899 (Stat., 1899, p. 96). The bill was filed against the Assessor to enjoin assessment of the shares of stock of the appellant, a national

banking association. It alleged, among other things, the mode and manner in which the Assessor intended to make the assessment under the provisions of this statute, that such mode and manner were in contravention of the provisions of the statute, and that the statute itself was unconstitutional and void upon the grounds therein set forth.

To this bill an answer was filed (Record, p. 31–49) substantially admitting the mode and manner in which the Assessor intended to make the assessment. Upon the bill an application was made for a preliminary injunction. Upon hearing of that application the Court was of opinion that a temporary injunction should not issue to restrain the Assesor from making the assessment (Record, p. 154), but leave was given to file a supplemental bill after the Assessor had made the assessment. Agreeably to such leave a supplemental bill was filed (Trans., p. 53–86) to which an answer was filed (p. 89–114). Thereafter a second supplemental bill was filed (p. 117–142) making Joseph H. Scott, Tax Collector, a party to the bill. Afterwards an agreed statement of facts was settled, signed and filed, stating the mode and manner in which the assesement had been made (p. 159–172). Upon final hearing upon the pleadings and this agreed statement of facts the Court decreed that complainant's bill of complaint, supplemental bill of complaint and second supplemental bill of complaint be dismissed (Record, p. 149).

From this decree the complainant has appealed.

Upon the final hearing in the Circuit Court complainant submitted the points and authorities subjoined hereto.

The appellees likewise submitted points and authorities, therein citing upon the question of due process of law

Hagar vs. *Reclamation District*, 111 U. S., 701–10.
Palmer vs. *McMahon*, 133 U. S., 660–69.
State Railroad Tax Cases, 92 U. S., 575–610.
Kentucky Railroad Tax Cases, 115 U. S., 330–2–3.
State vs. *Springer*, 134 Mo., 225–6.
Land Co. vs. *Minnesota*, 159 U. S., 626–37.
Lent vs. *Tillson*, 140 U. S., 324.
Cooley on Taxation, 364–5.
State vs. *Runyon*, 41 N. I. L., 98.

And further, taking the position that the grievance complained of in the bill was one of valuation, appropriate relief for which was furnished at the hands of the Board of Equalization, citing in support thereof

Henne vs. *Los Angeles County*, 129 Cal., 297–99.

In regard to these authorities on behalf of appellant the following answer was made:

DUE PROCESS OF LAW.

While the construction of the constitution and statutes of the State are within the peculiar province of the State tribunals, it is no less true that the determination of what constitutes due process of law is one the ultimate decision of which necessarily rests with the federal tribunals. Therefore, in such cases the State tribunals must yield to the decision of the federal courts.

See *Belcher* vs. *Chambers*, 53 Cal., 635–643.

The ground upon which the unconstitutionality of the statute here in question in this particular is asserted, is that the tax payer is not furnished with notice and opportunity to be heard. The Assessor makes the assessment without notice to him; his property is seized and sold without notice to him. He is afforded no notice or opportunity to be heard. Proceedings for the enforcement of the tax are not judicial; they are summary. In such cases the rule is that there must be notice and opportunity to be heard.

This distinction is recognized and enforced in the authorities to which counsel refer and is pointedly enforced in *Reclamation District* vs. *Phillips*, 108 Cal., 306.

See *Ex parte Lambert*, 22 Cal. Dec., 751.

This court, therefore, must determine this question for itself in light of the decisions of the Supreme Court of the United States. Any decision of the State Court to the contrary cannot avail to deprive the tax payer of the rights secured to him under the constitution of the United States.

In regard to the case of *Rode* vs. *Siebe*, 119 Cal., 521, we may remark that it is in direct conflict with the case of *People* vs. *Pittsburg Railroad Co.*, 67 Cal., 625. Under the constitution of the State of California, to constitute a valid tax there must be, first: An assessment by the local Assessor; second, the tax payer is entitled to be heard in support of his application to have this assessment equalized; third, there must be a valid law fixing the rate of taxation. These are three essential constituents entering into the creation of a valid tax under the constitution of the State of California. Under the constitution of California, the Tax Collector is only authorized to collect taxes. All these steps must have ripened into the creation of such taxes and have anteceded collection thereof by the Tax Collector. Before any rate has been fixed, before any assessment has been made, before the tax payer has had any opportunity to have his assessment equalized by the Board of Equalization, under the authority of *Rode* vs. *Siebe*, the Assessor is said to be authorized to make summary seizure and sale of the property of the tax payer in satisfaction of

a tax wanting in all of the constitutional constituent elements we have thus mentioned.

While the Supreme Court of the State is authorized, as already stated, to construe the statutes and constitution of the State, and its decisions thereon is authoritative in the federal courts, yet its decision that such proceedings constitute due process of law is not in the slightest conclusive upon this Court. This Court must, for itself, determine whether or not such proceedings constitute due process of law, and under the authorities to which the attention of the Court has already been called, we respectfully submit that it is not.

In regard to the position that this is a question of valuation, relief for which is furnished by the Board of Equalization, it is sufficient to say that it is the province of the Board of Equalization to equalize legal assessments, but it has no authority to pass upon the question of their legality.

P. M. S. S. Co. vs. *Board of Supervisors*, 50 Cal., 284.

In this case the question is the validity of the statute under which alone the assessment was made. Subsidiary to that question considerations bearing on valuation are relevant and proper for the purpose of showing that the act of the legislature is in contravention of the provisions of the act of congress authorizing assess-

ment of shares of the capital stock of national banking associations. It is in this respect alone such considerations have any bearing or are at all proper. But this does not show that such considerations are not proper, or that in consequence thereof relief can only be had upon application to a Board of Equalization.

The fundamental question is whether the statute under which the assessment was made is constitutional and valid or not, and this is a question of which the Board of Equalization constitutionally can have no cognizance.

EQUIVALENCY.

Upon this point counsel harp upon the case of *Burke* vs. *Badlam*, 57 Cal., 601, the correctness of which is not disputed. Its application is denied. The shareholders of appellant are entitled to the benefit of the rule announced in that case, but they are also entitled to the protection assured to them under the act of congress allowing the State to tax the shares of stock in national banking associations.

In *Burke* vs. *Badlam*, 57 Cal., 601, the Court correctly declared that:

"To assess all the corporate property of the corporation, and also to assess to each of the shareholders the number of shares held by him, would, it is manifest, be assessing the same property twice, once in the aggregate to the corporation, the trustees of all the stockholders, and again separately to the individual

stockholders in proportion to the number of shares held by each."

But the Court do not there decide or declare that the converse is true, namely, that the assessment of the shares of the stock of the corporation is the equivalent or only the equivalent of the assessment of the corporate property of the corporation. The question did not arise in that case; the Court was not called upon to decide it; the Court never did decide it. In this particular it is not authority. The Court cannot affirm that the converse of the decision in *Burke* vs. *Badlam* is either legally or in point of fact true. We have endeavored to enforce this in the points subjoined. To the extent of the difference between the actual value of the capital stock of the corporation and the actual value of the corporate property of the corporation, a discrimination is necessarily made against shareholders of national bank stock under the provisions of the statute. There is nothing in *Burke* vs. *Badlam* holding that the amount of this difference may not and does not exist. We know that it may and it does exist. We know that as to such difference stockholders in State corporations are not taxed, while shareholders in national bank associations are sought to be taxed.

Cotting vs. *Goddard*, 22 U. S. Sup. Ct. Rep., 30–43.

In the subjoined points we have already enlarged so much upon these questions that we forbear further remarks upon them. The Circuit Court filed no opinion, and we are therefore unable to conjecture the grounds upon which it denied the relief prayed for. Whatever may have been the grounds upon which it decided, its conclusion was erroneous, and we respectfully submit that its decree should be reversed and appellant awarded the relief prayed for in its several bills of complaint.

Dated Feb. 18th, 1902.

T. I. BERGIN,

Counsel for Appellant.

IN THE

Circuit Court of the United States,

NINTH CIRCUIT,

NORTHERN DISTRICT OF CALIFORNIA.

THE NEVADA NATIONAL BANK OF SAN FRANCISCO,
Complainant,

vs.

WASHINGTON DODGE, as Assessor, etc., et al.,
Defendants.

POINTS AND AUTHORITIES FOR COMPLAINANT.

In the previous cause between the same parties, this Court was called upon to consider the amendments of March 14, 1899, to Sections 3608, 3609, and 3610 of the Political Code (Stats. 1899, p. 96). The Court disposed of that case upon the ground that those amendments did not go into operation in time to affect the assessment there in question. In this view it became unnecessary to consider the constutionality of these amendments, and the Court forebore to pass upon it.

That case upon appeal has been affirmed by the Circuit Court of Appeals. It is now final.

Dodge vs. *The Nevada National Bank*, 109 Fed. R., 726.

In this case, however, the constitutionality of these amendments is the controlling question. The Court is compelled to pass upon it in order to decide the case, and hence it becomes necessary to submit such views as we deem proper to show that these amendments are unconstitutional. It may not, however, be improper preliminary to the presentation of these views to make a few general remarks.

I.

It is undoubtedly true that it is a political duty incumbent upon every citizen to contribute to the support of the Government. This is, however, merely a political duty. In and of itself it has no legal operation. It affords no basis of legal action or defense. Taxes are the contributions of the citizen to the support of the Government. There are constitutional provisions governing the right and mode of levying them. The legislature in enacting revenue laws must pass such laws in conformity with the provisions of the constitution upon the subject. Where such laws are not in conformity to the requirements of the constitution, they are inoperative and simple nullities. The tax

must be assessed, levied and collected in conformity with the requirements of valid statutes authorizing the same. It is only upon strict compliance with the requirements of such laws that there arises a valid tax. Then and then only is the citizen charged with a legal liability to contribute to the support of the government. There is no rule more familiar and well settled than that in construing such laws they are to be strictly construed. The unvarying language of the courts upon the subject is that as proceedings to levy and collect taxes are in *invitum*, in virtue of which the citizen may be deprived of his property, there must be a strict construction of the statutes, and a strict compliance with their provisions. These views are too familiar to the Court to need citation of authority in their support, and we merely mention them to call the attention of the Court to them. With these remarks we proceed to state our positions.

II.

CONSTITUTIONAL SCOPE OF TAXATION.

In *McCulloch* vs. *The State of Maryland*, 4 Wheaton, 316–429, Chief Justice Marshall observed that:

"All subjects over which the sovereign power of a state extends are objects of state taxation; but those over which it does not extend, are, upon the soundest principles, exempt from taxation. This proposition

may almost be pronounced self evident. The sovereignty of a state extends to everything which exists by its own authority or is introduced by its permission; but does it extend to those means which are employed by Congress to carry into execution the powers conferred on that body by the people of the United States? We think it demonstrable that it does not. Those powers are not given by the people of a single State. They are given by the people of the United States, to a government whose laws, made in pursuance of the Constitution, are declared to be supreme. Consequently, the people of a single state cannot confer a sovereignty which will extend over them. We find then, on just theory, a total failure of this original right to tax the means employed by the government of the Union for the execution of its powers. The right never existed, and the question whether it has been surrendered cannot arise."

The principle thus announced has ever since remained an axiom in constitutional law.

Section 3 of Article I. of the Constitution of California, declares that:

"The Constitution of the United States is the supreme law of the land."

Section 1 of Article XIII of the Constitution of California declares that:

"All property in this State, *not exempt under the*

laws of the United States, shall be taxed in proportion to its value, *to be ascertained as provided by law.*

This is the source and measure of the constitutional power of the legislature to enact revenue legislation. The declaration is not that all property in the State shall be taxed. Only certain property is to be taxed; all property in the State, not exempt under the laws of the United States. Upon the principle announced by Chief Justice Marshall rests this right of exemption from State taxation, and the exemption is co-extensive with the right itself. The property thus exempted is not subject to State taxation. Mere physical presence within the territorial limits of the sovereignty does not authorize the exercise of the power of taxation.

Van Brocklin vs. *Tennessee*, 117 U. S., 151.

Its exercise is limited by and co-extensive only with the sovereignty of which it is an essential attribute. Property exempt under the laws of the United States, independently of this constitutional declaration, would, under the Constitution of the United States, be exempt from State taxation; but, in order to render this exemption unmistakable and indubitable, the declaration was made in the Constitution of this State that such property shall not be subject to taxation.

In respect to such property, neither the legislature nor the State taxing officers have any authority upon

the subject of taxation. *It is entirely withdrawn from their jurisdiction.*

> *New Orleans* vs. *Houston*, 119 U. S., 275;
> *Douglas* vs. *Kentucky*, 168 U. S., 498.

Neither the legislature nor the State taxing officer is authorized to consider the same in dealing with the property that alone the Constitution declares shall be taxed. The constitutional injunction is *mandatory* and *prohibitory*. Its purpose must not be evaded, directly or indirectly. It matters not how or by whom the exempt property may be held, the exemption is equally obligatory. The exemption must be allowed in its entirety.

When, therefore, the legislature undertakes to enact revenue legislation, its authority to act is circumscribed by this constitutional limitation. It has no constitutional power to enact revenue legislation in respect to such exempted property. The constitutional declaration proclaiming its exemption from State taxation is, under the terms of the Constitution itself, *mandatory* and *prohibitory;* and, therefore, State legislation, under the provisions of the Constitution of this State, is wholly incompetent to legislate upon or affect by its revenue legislation any property exempt under the laws of the United States. The property that alone is taxable under the laws of the State of California is prop-

erty not exempt under the laws of the United States, and only in respect to such property has the legislature constitutional power to enact revenue laws.

In respect to property subject to State legislation the Constitution of California is not self-executing. Under the Constitution of California there can be no taxation without legislation. The constitutional mandate is that the taxable property of the State shall be taxed in proportion to its value to be ascertained as provided by law. Proportion to its value is a constitutional attribute of State taxation; but such value is to be ascertained as provided by law. Hence, there must be legislation before there can be constitutional taxation under the Constitution of California.

Under the constitutional principle thus announced by Chief Marshall, national banks are not subject to state taxation. The franchise to be a national bank is not subject to State taxation.

Owensboro National Bank vs. *Owensboro*, 173 U. S., 671;

National Bank of Louisville vs. *Louisville*, 174 U. S., 438–439;

First National Bank of Louisville vs. *Stone*, 174 U. S., 438–439.

While national banks are not subject to State taxation, Congress has declared that:

"The legislature of each State may determine and direct the manner and place of taxing all the shares of national banking associations located within the State, subject only to the two restrictions that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State, and that the shares of any national banking association owned by non-residents of any State shall be taxed in the city or town where the bank is located, and not elsewhere."

United States Revised Statutes, Sec. 5219, 173 U. S., 668;
Owensboro National Bank vs. *Owensboro.*

This is the measure of the power of the State to tax national banks.

First National Bank vs. *San Francisco*, 129 Cal., 97.

The authority thus given is to tax, not the banks, but the shareholders; and the authority to tax shareholders is upon the express limitations thus declared by Congress.

Whenever, therefore, state legislation assumes to tax shareholders of national banks at a greater rate than other moneyed capital in the hands of individual citizens of such State, such legislation is unconstitutional and void.

People vs. *Weaver*, 100 U. S., 539;
Pelton vs. *National Bank*, 101 U. S., 146;
Evansville Bank vs. *Britton*, 105 U. S., 322;
McHenry vs. *Downer*, 116 Cal., 25;
Miller vs. *Heilbron*, 58 Cal., 133.

III.

DUE PROCESS OF LAW.

In *Railroad Tax Case*, 8 Sawyer's Reports, 275, the Court declared that,

"Whatever the character of the proceeding, whether judicial or administrative, summary or protracted; and whether it takes property directly, or creates a charge or liability which may be the basis of taking it, the law directing the proceeding must provide for some kind of notice, and offer the owner some opportunity to be heard, or the proceeding will want the essential ingredient of due process of law. Nothing is more clearly established by a weight of authority absolutely overwhelming than that notice and opportunity to be heard are indispensable to the validity of the proceeding."

In *Hudson* vs. *Protection District*, 79 Cal., 94, speaking upon a statutory provision of this character, the Court say:

"It is argued that the owner of the land assessed has no opportunity under the act to be heard in regard

to the assessment, and that on non-payment his land will be sold without any opportunity to be heard as to this charge, which is declared to be a lien on his land and that he will thus be deprived of his property without due process of law.

"We think the point well taken. No provision is made anywhere in the statute for any hearing of the landowner whose land is to be charged. No notice is to be given him when the board of trustees is to levy the assessment, and if he appears when such assessment is to be levied by the board of trustees, no hearing by the board is provided for in the act. The collection provided for is summary, and without suit brought at which the property owner can be heard. The assessment is by the terms of the act made an absolute lien on his property, without any provision or opportunity allowed him to show its illegality or unconstitutionality.

"For these reasons, we are of opinion, according to well-settled rules, that the act is unconstitutional, and the assessment and sale under it can not be valid."

Section 3610 of the Political Code here in question expressly declares that,

"*No personal or other notice to such shareholders of such assessment shall be necessary for the purposes of this act.*"

Under the principle announced in the authorities

cited, this provision renders the statute unconstitutional.

Palmer vs. *McMahon*, 133 U. S., 668.

These authorities establish the right of the taxpayer to notice and opportunity to be heard in respect to his assessment. He is entitled to such notice, and without it proceedings to assess him are void, as depriving him of his property without due process of law.

Section 3610 not only does not make provision for such notice, but distinctly declares that no such notice shall be required. The only notice therein authorized or provided for is *notice to the bank*, *not notice to the stockholder*, expressly providing that no personal or other notice to the shareholders of such assessment shall be necessary for the purposes of this act. When the taxes are unsecured by real estate owned by the holder of the stock, then the bank is made liable therefor, and the assessor is authorized to collect the same from the bank, which may collect it from the stockholder. Thus a liability is finally and definitively fixed without any notice or opportunity to be heard. The only notice provided for is not a notice to the stockholder that an assessment is about to be made that he may have an opportunity to protect himself, but *a notice to the bank that an assessment has already been made*, with the express provision that no personal

or other notice to such shareholders of such assessment shall be necessary for the purposes of this act.

It is true that in

The People vs. *Pittsburg Railroad Co.*, 67 Cal., 625,

the Court held that,

"The legislature has no power thus to deprive the citizen of an opportunity of appearing before the Board (Board of Equalization) for the purpose of contesting the amount assessed against him,"

yet the statute can not be rescued from the taint of unconstitutionality upon the claim that the stockholder was thus constitutionally entitled to a right to appear before the Board of Equalization for reduction of the assessment made against him, for the reason that the amount fixed by the assessment of the assessor is conclusive under the statute, the provision being that in case the tax on any such stock is unsecured by real estate owned by the holder of such stock, then the bank in which such stock is held shall become liable therefor, and the assessor shall collect the same from said bank, which may then charge the amount of the tax so collected to the account of the stockholder owning such stock and shall have a prior lien to all other liens on his said stock and the dividends and earnings thereof for the reimbursement to it of such taxes so paid.

From this language it is evident that the amount the bank is liable for and the only amount that can be collected from it is the amount of the tax so fixed by the assessor.

This, and this alone, is the only amount, reimbursement of which is authorized under the statute. It is this amount and not any other or different amount. No provision is made that in case any change should be made in the assessment by any subsequent equalization, that the altered amount, and not the amount named by the assessor, shall be the amount the bank should pay and the stockholder should subsequently reimburse. The liability of the bank is, of course, a purely statutory creation. It is such as the statute has declared and none other. The bank can be held for no amount other or different from that expressly named in the statue. In this amount and in this amount alone is it, if at all, liable. This amount only is it authorized to appropriate out of the dividends and earnings of the stock of the stockholder. Nay, more, while the bank is thus declared liable for the amount it is so declared absolutely with a sole right of recourse for reimbursement to charge the amount of the taxes so collected to the account of the stockholder owning such stock with a right of prior lien on the stock and dividends and earnings thereof. Should the stockholder have no account with the bank, where is its

right to charge such account? Ownership of stock does not necessarily or at all place the stockholder in account with the bank. He may or may not have an account with the bank. Mere ownership of the stock creates no such account. The statute proceeds upon the assumption that the stock will be of equal or greater value than the amount of the tax, and that the bank will be able to reimburse itself out of its dividends and earnings, yet the stock may not have either dividends or earning and may not be of equal or greater value than the amount of the tax.

As already stated, the statute does not authorize or require the assessor to give notice of his intention to make the assessment. He is authorized by law to assess at any time between the first Monday of March and the first Monday of July. (Pol. Code, sec. 3628.)

Under sec. 3629 of the Political Code the assessor is required to exact from each person in his county the statement therein provided for. He has no authority to exact such statement except from residents of his county. His authority is confined to his county. He has no power to assess non-residents of his county.

Sec. 3633 of the same Code provides that where demand has been made of such statement, in case of neglect or refusal to furnish the same, the value fixed by the assessor must not be reduced by the Board of Supervisors, while sec. 3674 declares that no reduction

must be made in the valuation of property unless the party affected thereby, or his agent, makes and files with the Board a *written application therefor, verified by his oath*, showing the facts upon which it is claimed such reduction should be made. Recourse to the Board of Equalization in view of the language of sec. 3610, is not only unauthorized, but would be nugatory. A stockholder not only may not be a resident of the county, but he may not be a resident of the state, and thus may be powerless to enjoy the constitutional right of appealing to the Board of Equalization for reduction of the assessment. But as already stated, the language of sec. 3610 forbids all change or alteration of the sum fixed byt he assessor, and thereby necessarily exclude all authority of the Board of Equalization to alter or reduce the same as distinctly and unequivocally as if it had in terms so stated.

But the statute itself must contain provision for notice and opportunity to be heard.

In the matter of Lambert, Supreme Court of California, Record of December 6th, 1901:

Were not such the correct rule of constitutional law no statute could ever be declared unconstitutional upon this ground as the answer would always be that the constitution guaranteed the right and omission thereof in the statute could afford no ground of complaint.

Is not this depriving the stockholder of his property without due process of law? We think it is.

This we submit is an unauthorized exercise of power rendering the statute unconstitutional.

IV.

SECTION 3609 OF THE POLITICAL CODE AS AMENDED (Stats. 1899, p. 96) IS VOID FOR CONTRADICTION.

The language of the statute in this particular is:

"In making such assessment to each stockholder, there shall be deducted from the value of his shares of stock such sum as is in the same proportion to such value as the total value of its real estate and property exempt by law from taxation bears to the whole value of all of the shares of the capital stock in said national bank."

What does this provision mean? The franchise of the national banking association is exempt from state taxation.

In *Covington State Bank* vs. *Covington*, 21 Fed. Rep., 489, the Court held that the United States Revised Statutes do not permit taxation of the corporate property of the corporation, except its real estate. This decision is approved in

People vs. *National Bank of D. O. Mills*, 123 Cal., 53–61.

City and County of San Francisco vs. *Crocker-Woolworth National Bank*, 92 Fed. Rep., 273.

First National Bank of San Francisco vs. *City and County of San Francisco*, 129 Cal., 94.

Rosenblatt vs. *Johnston*, 104 U. S., 462.

Under the decisions, therefore, of the Supreme Court of the United States and the Supreme Court of this State, the corporate property of the corporation, except real estate, is exempt from taxation, and is not an element of the taxable value of its property. The constitution of this State itself declares that it is not within the domain of the legislature to tax.

Now, applying the rule for assessment declared in sec. 3608 of the Political Code, that the shares of stock in corporations possess no intrinsic value over and above the actual value of the corporate property of the corporation, which they stand for and represent, can there be any taxable value in the shares of stock in a national bank? Make the deduction directed by the statute, and apply the rule enjoined for assessment of the corporate property of state corporations, and it is evident that, necessarily, a different rule of valuation is applied in valuing the shares of shareholders in national banks from that applied in valuing the corporate property of state corporations, and that, what alone is

left subject to assessment as against him, is declared not subject to assessment in respect to the stockholder in a state corporation.

This amount is what is declared the assessable value of the franchise of the State corporation. It is assessed as the property of the corporation. It is the property of the corporation. So also is the franchise of the national bank not the property of the shareholders but of the bank. It is beyond the reach of assessment equally as well as the United States bonds the bank may hold. The shareholder is therefore entitled to the benefit of its immunity from State taxation as well as he is entitled to the benefit of the immunity of the United States bonds held by the bank.

The declaration upon this subject contained in sec. 3608, and the declaration contained in sec. 3608, last referred to, are obviously variant from each other, the one declaring that shares of stock in a corporation possess no intrinsic value over and above the actual value of the property of the corporation which they stand for and represent, and the other that the shares of stock of national banks possess an assessable value over and above such sum as is in the same proportion to such value as the total value of its real estate and property exempt by law from taxation bears to the whole value of all the shares of the capital stock in said national bank, thus recognizing a difference be-

tween the value of the shares of stock in a national bank and the value of its corporate property, while declaring that, in respect to a State bank, no such difference exists; that, in respect to national banks, the amount of such difference is assessable to the stockholders in national banks, while in respect to stockholders in State corporations, the same is unassessable.

In the case at bar it stands admitted that the complainant has not and never has had or owned any real estate. All its corporate property is other than real estate, and under the authorities to which we have called attention, is exempt by law from taxation. It is exempt under the Constitution of the United States; it is exempt under the Constitution of this State; it is exempt under the Act of Congress, and can constitute no element in the assessment of the shares of stock of its stockholders.

Thus is presented the case of a legislative mandate to assess, and in the same breath a legislative mandate to exempt from assessment the sole subject of assessment. This contradiction renders the statute inoperative and void.

Were authority necessary upon this point, we find it in the

Farmers' Bank vs. *Hale*, 59 N. Y., 53.

The Court there held the statute inoperative, declaring that,

"It (the statute) declares the intent and meaning to be to place state banks on an equality with national banks under the national act. Equality means the same rights and privileges and the same forfeitures, and it means nothing else. If this expressed meaning is to prevail, the state banks can have no other or different rights, nor be subject to any other or different forfeitures than national banks. It follows that if national banks were, notwithstanding the national act, subject to the usury laws of the state, the state banks are also, or else the declared meaning of equality is nugatory It is said that this renders the statute inoperative and that this result must be avoided. This is plausible, but not a valid or sound position. There is nothing in the Constitution nor in any legal principle to prevent the legislature from passing an act with provisions which render it inoperative."

State vs. *Partlow*, 91 N. C., 552;
Richards vs. *McBride*, L. R., 8 Queen's Bench, Div. 119;
Blanchard vs. *Sprague*, 3 Summer, 279.

Nor is it any answer to say that,

"When, therefore, it becomes manifest from a review of the revenue laws of California as construed by her courts, that the deductions to be allowed under this section of the act were to be so allowed for the purpose of avoiding a possible discrimination against

national banks, it is fair to consider the exemptions permitted state banks in order to determine what exemptions are intended to be allowed national bank stockholders. When the purpose and intent of the act is kept in mind, no difficulty is experinced in giving to this provision a rational and correct interpretation."

This is an absolute departure from the language of the statute. It is substitution of a rule different from that expressed in the statute where the language of the statute is clear and unambiguous. The property exempt by law means not the property of state banks, but of national banks. The context and terms of the statute unmistakably show this. The legislature is here treating of taxation of shares in national banks and the exemptions to be allowed in such taxation. Coupling the real estate of the bank with property exempt by law from taxation unmistakably shows what was in the mind of the legislature and of what it was speaking. To mention real estate of a state bank in this connection would be idle and insensible, but to mention it in connection with national banks, is at once intelligible and proper. The real estate of such banks is taxed, as is all other real estate, and hence not to exclude it would be palpable double taxation. The language is,

"The total value of its real estate and property exempt by law from taxation."

The real estate and property exempt by law from taxation are coupled together and placed upon the same plane, the one no less than the other must be deducted. National banks are entitled to exemptions. What are they? The authorities cited declare what they are. Counsel admit they are entitled to some, but insist that to allow them all to which these authorities declared they are entitled, would render the statute insensible. Admittedly federal bonds and securities are excluded. Why? Because under the law they are exempt from state taxation. Yet under the decisions to which we have called the attention of the court, the other property is under the law equally exempt from taxation. Upon what principle is one class of property to be excluded and the other not? Where is the authority for drawing the distinction? We confess we know of none. But what at once shows the untenability of this position is that the legislature had not the power, if it had the purpose, to limit or enlarge the extent of the "*property exempt by law from taxation*" for the constitution of the state as well as that of the United States had already placed the subject beyond the reach of legislative interference.

As already stated, *such property was exempt from taxation under both state and national constitution and wholly withdrawn from the domain of state legislation upon the subject of taxation.*

Applying the rule for assessments declared in sec. 3608 of the Political Code, that the shares of stock in corporations possess no intrinsic value over and above the actual value of the corporate property of the corporation which they stand for and represent, can there be any taxable value in the shares of stock in a national bank? Make the deduction directed by the statute, and apply the rule enjoined for assessment of corporate property of state corporations, and it is evident that, necessarily, a different rule of valuation is applied in valuing the shares of shareholders in national banks from that applied in valuing the corporate property of State corporations, and that, what alone is left subject to assessment as against him, is declared not subject to assessment in respect to the stockholder in a State corporation.

The declaration upon this subject contained in sec. 3608, and the declaration contained in 3609, last referred to, are obviously variant from each other, the one declaring the shares of stock in a corporation possess no intrinsic value over and above the actual value of the property of the corporation which they stand for and represent, and the other that the shares of stock of national banks possess an assessable value over and above such sum as is in the same proportion to such value as the total value of its real estate and property exempt by law from taxation bears to the

whole value of all the shares of the capital stock in said national bank, thus recognizing a difference between the value of the shares of stock in a national bank and the value of its corporate property, while declaring that, in respect to a State bank, no such difference exists; that, in respect to national banks, the amount of such difference is assessable to the shareholder in national banks, while in respect to stockholders in State corporations, the same is unassessable.

V.

SECTIONS 3608, 3609 AND 3610 OF THE POLITICAL CODE AS AMENDED ARE VOID AS MAKING INJURIOUS DISCRIMINATION AGAINST NATIONAL BANKS.

Before entering upon discussion of this point, we desire to premise a few remarks in respect to decisions of the Supreme Court of the United States, that will doubtless be called to the attention of the Court in the course of this discussion.

In various cases, of which *Aberdeen Bank* vs. *Chehalis County*, 166 U. S., 440, is an illustration, the Supreme Court of the United States has been called upon to determine whether or not exemptions allowed by state laws could operate as a discrimination in the assessment and taxation of shares in national banks. In

these decisions, the Court established the position that where its constitution permits the state legislature may make such exemptions from taxation as in its wisdom it may deem proper, and that such exemptions will not operate to create an injurious discrimination in the assessment and taxation of the shares in national banks, that the rule regarding such discrimination can only operate in respect to property *subject to taxation* under the laws of the state *that comes in competition with the business of national banks*, and that it is only in respect to such property the rule against discrimination can have any application. This, of course, is not the question in the case at bar. We are dealing here with a question of the assessment and taxation of property subject to taxation, and considering whether or not in respect to such property any such injurious discrimination is made. We pass, therefore, to the question of the constitutionality of these sections in the Political Code.

Section 3608 declares that:

"Shares of stock in corporations possess no intrinsic value over and above the actual value of the property of the corporation which they stand for and represent; and the assessment and taxation of such shares, and also the corporate property, would be double taxation. Therefore, all property belonging to corporations, save and except the property of national banking associa-

tions not assessable by federal statute, shall be assessed and taxed. But no assessment shall be made of shares of stock in any corporation, save and except in national banking associations, whose property, other than real estate, is exempt from assessment by federal statute."

Under the provisions of this section, the stockholder in a state corporation is not subject to taxation. The corporate property of the corporation is alone subject to taxation.

The constitutionality of this statute was affirmed in

Burke vs. *Badlam*, 57 Cal., 594.

City and County of San Francisco vs. *Mackay*, 10 Sawyer, 302.

County Commissioners vs. *Farmers' and Mechanics' Bank*, 48 Md., 117.

Germania Trust Co. vs. *San Francisco*, 128 Cal., 594.

The rule is familiar, that the decisions of the Supreme Court of the State, construing its constitution and statutes, are binding upon the Federal Courts.

Upon the provisions of this section we may remark that

First. Shares of stock in State corporations are declared to possess no intrinsic value over and above the actual value of the property of the corporation.

Second. Assessment and taxation of such shares and also the corporate property would be double taxation.

Third. All property belonging to State corporations alone shall be assessed and taxed.

Fourth. No assessment shall be made of shares of stock in State corporations.

The rule thus provided in respect to State corporations is declared inapplicable to national banking associations. While the State corporation is alone assessable under its provisions, there is no authority for assessing national banking associations. Of course, had there been, it would have been idle, as the State has no power to authorize assessment of the same.

It will be observed that the statutory declaration, and the decision of the Court in *Burke* vs. *Badlam*, 57 Cal., 594, that shares of stock possess no intrinsic value, is at variance with the well-settled decisions of the Federal Courts, the last of which is contained in the Owensboro case, in 173 U. S., 671; yet, it having been enacted by the legislature, and the constitutionality of that enactment having been affirmed by the Supreme Court of the State, it is binding upon all persons within the State of California subject to its jurisdiction; and all such persons are entitled to invoke the benefit of its provisions. The shareholder in a na-

tional bank association is no less entitled to its benefit than the stockholder in a State corporation.

In these particulars, therefore, this section of the Political Code discriminates between shareholders in national bank associations and stockholders in State corporations:

1. The stock of the one is subject to State taxation; the stock of the other is not.

2. The statutory rule as to the value of stock is made applicable to State corporations, and declared inapplicable to national banking associations.

3. The corporate property alone of State corporations is assessable, while, of course, there is neither provision nor authority for assessing the corporate property of national banking associations.

First National Bank vs. *San Francisco*, 129 Cal., 96.

Shareholders in national bank associations are entitled to the benefit of the rule announced in *Burke* vs. *Bidlam*, as embodied in this section of the statute. Only by applying that rule to shareholders in national bank associations can they stand upon equality with stockholders in State corporations. If the rule of valuation in respect to the one be more onerous than the rule of valuation in respect to the other, to the extent of such difference there is necessarily an injurious discrimination. If the value of the shares of stock be

greater than the actual value of the corporate property of the corporation as applied to shareholders in national banking associations, to the extent of such difference over and above the actual value of the corporate property there will be an injurious discrimination against the shareholders in national banking associations, rendering the statute unconstitutional.

Instead of applying to them the rule applied to State corporations, a different and a more burdensome rule is applied. That there is a difference between the two rules and that such difference is material and injurious will readily appear.

In regard to State corporations, nothing but property is assessed. The provision for its assessment is the same as that for the assessment of individual property.

The only element entering into it that is property permissable in its assessment is the value—its actual cash value according to the definition prescribed by the statute—the amount at which the property would be taken in payment of a just debt due from a solvent creditor (Pol. Code, Sec. 3617, Sub. 5).

> *Kishlar* vs. *Southern Pacific Railroad Co.*, Supreme Court of California, Record for Dec. 6th, 1901.

In addition to this, in assessing the corporate property of the corporation, the corporation is entitled to all the exemptions allowed by law. Federal bonds and

Federal securities that it may hold must be deducted in assessing its corporate property. They are entitled to all the deductions authorized by the provisions of paragraph six of section 3629 of the Political Code; that is to say, "all solvent credits, unsecured by deed of trust, mortgage or other lien on real or personal property, due or owing to such person, or any firm of which he is a member, or due or owing to any corporation of which he is president, secretary, cashier, or managing agent, *deducting from the sum total of such credits* such debts only, unsecured by trust deed, mortgage or other lien on real or personal property as may be owing by such person, firm or corporation, to bona fide residents of this State."

Under authority of this provision, State banks are entitled to, and do, deduct the amount they owe to their depositors from the amount due them. If a corporation owns property exempt from taxation, it is entitled to claim the exemption. In fact, the Constitution, declaring what property shall be taxed, excludes property exempt under the laws of the United States from the taxable property of the State.

The sum, therefore, of the assessable value of the corporate property of State corporations is the amount of the value of corporate property remaining after making these deductions therefrom.

It is true that it is claimed that under the provisions

of paragraph six of sec. 3629 of the Political Code the right to such deductions is dependent upon compliance with the terms therein prescribed. That in absence of compliance with these requirements the taxpayer will not be entitled to the benefit of its provisions. This is undoubtedly true. But under its provisions all persons desirous of availing themselves thereof are entitled to do so, and their failure to comply with requirements thereof so as to entitle themselves to the benefit of its provisions, in no wise invalidates them or creates any injurious discrimination to a legal intent between the persons who may so comply and those who may fail to do so. The difference that may result from such neglect is not the fault of the law, but the default of the parties themselves, of which they are not entitled to complain. But where the *right* to thus entitle themselves to the benefit of such deduction *is not accorded*, then the *statute itself makes the discrimination that renders it injurious.* Such discrimination does not result from the act of the party, but from the provision of the law itself. While he may not complain of the one, he is justly entitled to complain of the other. While in the one case there may be no violation of his constitutional rights, in the other there will be a palpable discrimination to his detriment. In the one case there will be a violation of the provisions of section 21, article I., of the Constitution of California, read-

ing: "Nor shall any citizen or class of citizens be granted privileges or immunities which upon the same terms shall not be granted to all citizens;" and in the other, there will be no such violation. The distinction between the two cases is obvious. It is recognized and endorsed in

Whitbeck vs. *Mercantile Bank*, 127 U. S., 199,

and enforced in

Miller vs. *Heilbron*, 58 Cal., 138.

The validity or invalidity of the statute upon this subject can not depend upon the compliance or non-compliance with its requirements. If the statute be constitutional the action or inaction of the party will be wholly immaterial, and the action or inaction of the party can never render the statute constitutional.

Such, therefore, is the sum of the assessable value of the corporate property in a State corporation under the laws of the State.

Stock, however, is valued in an entirely different way. The value of the stock of a corporation not only depends upon the value of the corporate property, but also upon the skill and efficiency with which its business is conducted, the character of the business, its value, remunerative nature, and various other elements entering into the value of a successful business. The cash value of the plants of two corporations may be precisely the same intrinsically, yet the stock of the

two corporations may differ greatly in market value; the one enterprise may not be a success, the other may be prosperous and profitable; the one may have to levy assessments while the other is declaring dividends to its stockholders.

As the Court say in *McMahon* vs. *Palmer*, 12 Daly, 364:

"The shares are held, bought and sold at pleasure; their value is decreased or lessened by factors not directly affecting the capital. If the corporation pays dividends, the stock appreciates; if not it declines. Share value depends upon the successful or unsuccessful use of capital and business management. Were there no difference between stock and capital, the valuation of the former would depend solely upon the increase or decrease of the latter. *The value of any successful business may be far in excess of the capital invested and the holder of corporate stock shares possesses more than the right to a proportionate part of the corporate property, i. e., his quota of the profit.*"

Owensboro National Bank vs. *Owensboro*, 173 U. S., 664, 667.

Evidently, therefore, when the stock of the corporation is assessed, and not its corporate property, the assessment of the stock will embrace and include elements not at all entering into the assessment of the

property. The difference in amount between these respective elements is necessarily a discrimination against the shareholders in national banks, and this discrimination necessarily results from really assessing the stock and not the corporate property of the corporation. It stands admitted in this case that all these elements combined or entered into consideration, and in ascertaining the value of the stock of complainant (*Vide* paragraph 9 of Bill of Complaint).

The rule, therefore, applicable to the property of the stockholder in a state corporation, or in a state bank, is not the equivalent of the rule made applicable to shareholders in national banking associations.

It is true that franchises are assessable under the Constitution and laws of the State of California, and that this element of difference between the value of the corporate plant and the market value of the stock is treated as the value of the franchise, as in

Spring Valley W. W. vs. *Schottler*, 62 Cal., 117, where the Court say:

"It appears from the record in this case that the Board of Supervisors, in the exercise of its power of equalization, assessed the franchise of the Water Works by taking the aggregate of the market value of the shares of stock in the company on the 7th of March, 1881, and deducting therefrom the value of the real and personal property of the company, and

held the difference to be the value of the franchise. The market value of the shares was shown to the Board by the testimony of witnesses. Such a mode of arriving at the value of the franchise appears to have been adopted by the assessor in *San Jose Gas Co.* vs. *January*, 57 Cal., 614, and this mode was held to be within the powers vested in the assessor. It was also impliedly approved as a current mode in *Burke* vs. *Badlam*, above cited (see *Commonwealth* vs. *Hamilton Mfg. Co.*, 12 Allen, 306)."

The State Court thus recognizes this difference as constituting the measure of value of the franchise of the corporation. Yet, as we have seen, as to national banks, this is a subject not liable to assessment or taxation under State law. Of course, were it material to here consider the question as to whether or not the charter of a mere private corporation constitutes a franchise subject to assessment and taxation under the Constitution of California, we should not by any means be prepared to concede that point, but as the question is in no wise involved in this case, we do not deem it necessary to further refer to the subject.

There is another view of the matter, showing that the shareholder in a national bank association is entitled equally with any other citizen of the State to the benefit of the constitutional and statutory rule of taxation to which other citizens of the State are entitled,

and that he is not liable to be subjected to any greater burden of taxation than any other citizen in the State.

A corporation is merely an authorized aggregation of individuals formed for the conduct of its business. The artificial person thus arising is still but the representative of the individuals constituting it, and they are equally entitled in the conduct of their business through corporate form to the benefit of all the protection of the law as if they had not in corporate form engaged in the management of their business.

As the Court say in *Gulf, Colorado & Santa Fe Ry.* vs. *Ellis*, 165 U. S., 154:

"The rights and securities guaranteed to persons by that instrument (Fourteenth Amendment of the Constitution of the United States) cannot be disregarded in respect to these artificial entities called corporations any more than they can be in respect to the individuals who are the equitable owners of the property belonging to such corporations. A State has no more power to deny to corporations equal protection of the law than it has to individual citizens."

Applying the rule thus announced to the case of the stockholder in the National Bank Association, and the unconstitutionality of the statute will at once be manifest. Here are two classes of men engaged in the same line of business. One class is conducting its business

under State corporate form; the other under national corporate form. In all other respects they are the same. They are the same citizens; they own the same property; they are engaged in the same business; they are liable to the same burdens of taxation; they are entitled to the same statutory and constitutional exemptions. The only difference between them is that one is acting under State and the other under national authority. While this may constitute distinction sufficient to authorize certain classification for the purposes of taxation, it does not authorize or furnish the basis for imposing different burdens of taxation, nor for imposing a more onerous burden of taxation upon the men doing business under national authority than is imposed upon the men doing business under State authority.

Equality of burden is the absolute right of all. This equality of burden cannot be arbitrarily destroyed under guise of classification. The proprietary interest of the shareholder in a national bank association should not be charged with any greater burden than is the proprietary interest of a stockholder in a State corporation. Owing to the distinctive and different authority under which they act, the mode of determining the burden may be different; but, while the mode may be different, the burden cannot be made unequal. The attempt to do so would be violative of the constitutional

equality secured to the shareholder in the national bank association, under the Constitution and laws of the State of California, as well as under the Constitution and laws of the United States.

The rule of valuations, therefore, applied under the statute to national bank associations constitute an invasion of the rights and an injurious discrimination against the interest of their stockholders.

Again, the shareholder in the national bank association is entitled to all constitutional and statutatory rights and immunities that the stockholder in a State corporation is. What they are we have already measurably called to the attention of the Court. Apply them to the interest of the shareholder in a national bank association. As we have seen, all property exempt under the laws of the United States is withdrawn from and not subject to State taxation. It matters not by whom such property may be held or owned. It is thus exempt whether owned by individuals or a corporation.

As already stated, the complainant has not and never did own any real estate, and its corporate property is exempt under the laws of the United States. It is not the subject of State taxation. The franchise of the association to be a corporation is not the subject of State taxation. In respect to State corporations and citizens generally, all these proprietary elements are

withdrawn from the domain of State taxation. How then, or upon what principle are they rendered amenable to State taxation because owned and held by a shareholder in a national bank? Can this be otherwise than upon the basis of an injurious discrimination against such association? Not at all. Where can there be any taxable value in his stock after withdrawal of all these constituent elements of value from it? Evidently none. Yet while such is the behest of the constitution and the statutes of this State, the assessor has levied a tax upon the shares of the shareholders of complainant, representing a large amount in value.

Another respect in which the interests of the shareholder in the national banking associations are injuriously affected is in that they are not authorized to demand deductions from their solvent credits of the amount of their debts due to bona fide residents of the State of California.

In the cases of *Miller* vs. *Heilbron*, 58 Cal., 133, and *McHenry* vs. *Downer* 116 Cal., 20, the Court declared the rule sought to be applied to the assessment of shares in national bank associations invalid, because in making such assessments deductions were not authorized to be made as provided in paragraph six of section 3629 of the Political Code.

The language of section 3609 upon this point is:

"That in the assessment of such shares each stockholder shall be allowed all the deductions permitted by law to the holders of moneyed capital in the form of solvent credits in the same manner as such deductions are allowed by the provisions of paragraph six of section 3629 of the Political Code of the State of California.

Does this provision obviate the objection held fatal in *Miller* vs. *Heilbron*, 58 Cal., 133, and *McHenry* vs. *Downer*, 116 Cal., 20?

Apart from the declaration contained in this amendment, the stockholder, under the law, would be entitled to the deductions allowed by paragraph six of Section 3629 of the Political Code. This declaration accords him no greater measure of right than he would be entitled to without it. The amendment fails to obviate the difficulty. The real difficulty was and is that the stockholder in a State corporation individually was entitled to the benefit of this exemption, and the corporation itself was equally entitled to the benefit of this exemption. Thus a stockholder in a State bank not only gets the benefit of the deduction of all that he may personally owe to bona fide residents. but also the benefit of the deduction of all that the corporation may owe to such bona fide residents. National bank associations, not being subject to State taxation, are not, as State banks are, in a position to claim the benefit of this right to deductions.

The amendment does not give the stockholder in national banking associations the benefit thus secured to the stockholder in the State bank, through the assessment being made against the corporate property of the corporation. It contains no declaration that in making the assessment he shall be allowed, not only the benefit of the deductions provided for in paragraph six of sec. 3629 of the Political Code to himself personally, but also his proportion of the deductions to which the banking association would have been entitled were it a State and not a national institution.

For instance, in *Burke* vs. *Badlam*, 57 Cal., 601, the Court say:

"To assess all the corporate property of the corporation and also to assess to each of the stockholders the number of shares held by him, would, it is manifest, be assessing the same property twice, once in the aggregate to the corporation, the trustee of all the stockholders, and again separately to the individual stockholders, in proportion to the number of shares held by each."

In the conduct and management of the business of a bank there will necessarily be a large amount of debts due to *bona fide* residents of the State. A State bank is authorized to deduct the amount of such indebtedness from the amount of taxable credits. The national bank is not thus allowed. The trustee of one class of

stockholders is allowed to make the deduction; the trustee of the other class of stockholders is not allowed to make the deduction. The discrimination is patent. The stockholder in the State bank is allowed to make the deduction; the State bank is allowed to make the deduction. The shareholder in the national bank is individually entitled to make the deduction. The national bank is not entitled to make the deduction, nor is the shareholder entitled to make the deduction on account of his proportionate interest in the bank.

What provision is made for such allowance in the amended section of the statute? None. The objection, therefore, held good in *Miller* vs. *Heilbron* and *McHenry* vs. *Downer* still remains and is equally fatal to the attempt to tax the shares of stock in national banks. Stock is not now any more than it was then a solvent credit.

Dutton vs. *Bank*, 53 Kans., 440–463;
First National Bank vs. *Ayres*, 160 U. S., 660–664;
Commercial Bank vs. *Chambers*, 182 U. S., 560;
McHenry vs. *Downer*, 116 Cal., 20–27–29.

Its terms will no more authorize the shareholder of a national bank to now claim deduction from the value of his stock deduction of his proportionate share of the debts of the bank to *bona fide* residents of this State

than they did before the enactment of the statute of March 14, 1899.

In a still further particular sec. 3610 of the Political Code injuriously discriminates against the shareholder in national bank associations. We have already called the attention of the Court to the principle that the tax-payer is entitled to notice and an opportunity to be heard in respect to the assessment of his property.

Railroad Tax Case, 8 Sawyer, 275.

Under the Statute of California, he is entitled to have the assessment of her property equalized as well as the assessment of the property of the state equalized, so that the burdens of taxation may be fairly and equitably distributed among the tax-payers of whom he constitutes one.

People vs. *Pittsburg Railroad Co.*, 67 Cal., 625.

Of this right he is deprived under the provisions of Sec. 3610 of the Political Code. This section requires the assessor within ten days after he has made his assessment, to give written notice to the banking association of such assessment of the shares of its respective shareholders, and no personal or other notice to such shareholders of such assessment shall be necessary for the purposes of this act, and where the tax on such stock is unsecured by real estate owned by the holder of such stock, then the bank in which the stock is held

shall become liable therefor, and the assessor shall collect the same from said bank. This he may do summarily at any time before the first Monday of July. At any time before that date he may collect the taxes by seizure and sale of any personal property of the shareholder. (Pol. Code, sec. 3821.) He may in like manner enforce collection of the amount from the bank. This amount he is authorized to collect from the bank. This amount the bank is authorized to pay, assuming the validity of the statute. This amount, and this amount alone, is the bank authorized to charge to the account of the stockholder, with a right to have a lien prior to all other liens on the stock and the dividends and earnings thereof for the reimbursement to it of such taxes so paid

Under the decision of this Court that was affirmed in the Circuit Court of Appeals the stock alone liable to assessment for any fiscal year is that owned on the first Monday of March of the year. The stockholder who then owned it alone is liable to assessment therefor. There is no provision of law impounding the stock on the first Monday of March. It does not cease to be negotiable; it does not cease to be vendable; it it does not cease to be transmissible. Ownership of the stock may change. The assessor may assess at any time between the first Monday in March and the first Monday in July. How the bank is to protect itself

in view of these indubitable legal rights of the shareholder, it is difficult to conceive. The assessment can legally only be made against the shareholder owning the stock on the first Monday of March. (*People* vs. *National Gold Bank*, 51 Cal., 508.) The bank can only pay the tax upon the assessment where legally made. Necessarily, therefore, it would be bound at its peril to ascertain and determine that when the assessor made his assessment the person who owned the stock on the first Monday of March continued his ownership up to the time of the making of the assessment.

As already stated, the bank is only entitled to pay, and can only pay the amount in which the assessor assesses the tax. This is the only amount that he can charge in account against the account of the shareholder, if he can be discovered, and if he have an account with the bank, and there is no provision of law for the payment of any other or any different sum. Where then is the constitutional right of the shareholder to equalization of the assessment? Of what avail would it be to him? Does not the nature of the proceeding show that the amount named by the assessor was designed to be absolute and final, not liable to be altered or changed upon proceedings for equalization of the assessment? Is not this a discrimination against the shareholder in national bank associations? Is not this denying to him a right secured

to all other taxpayers? Does not the statute in this respect injuriously discriminate against him?

Nor is it any answer to these views to say that the act of Congress authorizes taxation of the shares of the shareholders in national banks, and that it is well settled by the decisions of the United States Supreme Court,

"That the property of shareholders in their shares and the property of the corporation in its capital stock are distinct property interests, and where that is the legislative intent clearly expressed that both may be taxed."

New Orleans vs. *Heaston*, 119 U. S. 277,

for the reason that while the act of Congress authorizes such taxation, it at the same time requires that such taxation shall not be at a greater rate than upon other moneyed capital in the hands of individual citizens, thus coupling with the authority to tax the limitation thereon that the burden shall not be greater as to individual shareholders in a national bank than as to the stockholder in a state corporation.

In the *National Bank* vs. *Commonwealth*, 9 Wall., 353–363, where the Court upheld the power of the State of Kentucky to tax the shares of stock in the National Bank, the Court say:

"It is said here in argument that the tax is void because it is greater than the tax laid by the State of

Kentucky on other moneyed capital in that State. This proposition is not raised among the very distinct and separate grounds of defense set up by the bank in the pleading, nor is there any reason to suppose that it was ever called to the attention of the Court of Appeals, whose judgment we are reviewing.

"We have so often of late decided that when a case is brought before us by a Writ of Error to a State Court, we can only consider such alleged errors as one involved in the record and actually received the consideration of the State Court, that it is only necessary to state the proposition now as the question thus sought to be raised here was not raised in the Court of Appeals of Kentucky, we cannot consider it."

The question is here distinctly presented. There is no escape from its decision. The constitutional rule of assessment of property in this State is thoroughly established. Every one is entitled to the benefit of it. No one can be righfully deprived of the benefit of it. One rule upon this subject cannot be made to apply to one class of tax payers and another apply to another. Shareholders in national banks are entitled to the benefit of this rule equally with every other tax payer. The legislature could not, if it would, deprive them of the benefit of it. It is a principle of the constitutional law of this State that no such discrimination can be made.

Johnston vs. *Goodyear Mining Co.*, 127 Cal., 9;
Krause vs. *Durbrow*, 127 Cal., 684;
Ex Parte Clancy, 90 Cal., 553–558;
City of Pasadena vs. *Stinson*, 91 Cal., 248–249;
Cullen vs. *Glendora Water Co.*, 113 Cal., 512–513–514.

While, therefore, the interests of the shareholder in a national bank association may be liable to taxation under the Constitution and laws of this State, the burden of taxation imposed upon his interest cannot be greater than that imposed upon the interest of any other taxpayer in the State, and he is entitled to the enjoyment of all the rights, constitutional and statutory, that every other tax payer is entitled to.

The decisions of the Supreme Court of the United States making the distinction between the property of shareholders in their shares, and the property of the corporation in its capital, cannot avail to impair or affect these rights.

New Orleans vs. *Houston*, 119 U. S., 275.

While we may admit the distinction thus drawn and concede that the interest of the shareholder in national banking associations may be subject to taxation, yet such interest must be assessed according to the principles, constitutional and statutory, governing the assessment and taxation of all other property in the State.

Equality of burden is the constitutional right of the tax payer. It matters not whether that tax payer be a stockholder in a state or in a national bank; it matters not in what his property may consist. The mode of assessment, the manner in which the burden may be levied, imposed and enforced, are mere modal questions not affecting the vital one of equality of burden. In face of this fundamental and constitutional right, mere modes of procedure must give way. That can never be allowed to override or impair the ultimate right of equality of burden.

As we understand, appellant's brief in reply in No. 667 in the United States Circuit Court of Appeals for the Ninth Circuit, Washington Dodge, as assessor, etc., vs. The Nevada National Bank of San Francisco, etc., is to be submitted as part of the argument of this case, it may not be improper to make a few remarks upon some of the points advanced in that brief.

The position (p. 14) that it is inequitable for a tax-payer to invoke the aid of a Court of Equity to protect his property against an unauthorized and unconstitutional assertion of tax power, has the merit of novelty. The tax-payer is entitled to the benefit of the constitution in its entirety and is entitled to demand that no tax shall be imposed upon his property in contravention of any of its provisions. The provisions of the constitution are mandatory and prohibitory, and where there has been legislation transgressing any of them

under which the tax is sought to be levied upon his property, he is entitled to invoke the aid of equity in a case otherwise presenting equitable grounds for its interposition. Assumption that any provision of the statute may have been designed for his benefit does not the less entitle him to thus appeal. The power of the legislature is circumscribed by the provisions of the constitution under which it acts, and he is entitled to insist that it shall act only within the limits authorized thereby. There is nothing illegal, nothing inequitable in his so doing, nor has any authority been cited in contravention of his right to do so.

Moreover, complainant has no option in the premises. It is bound to invoke all constitutional and statutory provisions for the benefit of its stockholders. It is upon the ground of its duty to thus act that it is entitled to appeal to a Court of Equity for the protection of the trust of which it is administrator, the fund of which it is trustee, and the shareholders, the beneficiaries of the trust. To protect the trust, save it from dissipation and shield itself against a multiplicity of suits it is entitled to appeal to a Court of Equity against unlawful and unauthorized exercise of the taxing power. This right involves the correlative duty to act in the premises. It is not at liberty to waive any statutory or constitutional provision in the premises. Only upon showing that the constitution and the laws have been observed in the levy and collection of the

tax will it be entitled to exact reimbursement from the stockholder of such amount as it may pay in satisfaction of the tax. The stockholder may waive, may acquiesce; the complainant is not at liberty to do so.

Did the cases of *Supervisors* vs. *Stanley*, 105 U. S., 305, and *Palmer* vs. *McMahon*, 133 U. S., 667, authorize such a position, it is sufficient to say that that position is not in harmony with the decision of the Supreme Court of this State in *Miller* vs. *Heilbron*, 58 Cal., 133, where the Court declare (p. 140):

"*It would seem to be unnecessary to add that the restriction operates upon State legislation; and, therefore, the fact whether in a particular instance the owner of national bank stock shares owes any debts is immaterial. By the law of the State he is not permitted to deduct them if he does owe any.*"

McHenry vs. *Downer*, 116 Cal., 20, 27, 31.

Of course, the construction the Supreme Court of California places upon its Constitution and revenue laws is authoritative and controlling. This is the settled rule upon this subject. The constitutionality of the law cannot be tested by any nonfeasance or consent of the tax payer. The only criterion for determination of that question are the provisions of the Constitution itself. Nor is it true (p. 19) that: "An assessment of the shares is an assessment of the net assets of the cor-

poration." Such assessment it is that works the injurious discrimination complained of. The net assets of the corporation and an assessment of the shares of its stock are two widely different things for the reasons we have already submitted to the Court.

Corporate assets, of course, consist of the property of the corporation, that is, the property of the corporation in State corporations under the laws of this State liable to assessment. That may or may not in value equal the value of the stock of the corporation.

Nor does the *First National Bank of Wellington* vs. *Chapman*, 173 U. S., 205, give any support to this position. This case conclusively shows the propriety of the principle adopted by the Supreme Court of the United States that the Supreme Court of the State is the best and final arbiter of the correct construction of the Constitution and statutes of the State.

In resolving a question of that kind the Court is bound to consider all the provisions of the statute and all statutes in *pari materia* and all provisions of the constitution in order to arrive at their true meaning and give them a correct construction. Language will be moulded so as best to give effect to the intention of the legislature or the intention of the people in their organic law. Not only this, but in solving such question the Court will not limit itself merely to the dry language of the text, but will take into consideration

the policy of the State as embodied in its constitution and statutes. It will enlarge or restrain language occurring either in statute or constitution so as to arrive at the true intention of either the constitution or the statute as the case may be. Language that might under one condition of things mean one thing, under another condition of things may be considered to mean a different thing. Time, place, purpose, as well as text of the instrument must be borne in mind when solving such question. These considerations are not inappropriate when determining the value of the authority of the *National Bank of Wellington* vs. *Chapman*, 173, U. S. 205.

In the *People* vs. *Hibernia Bank*, 51 Cal., 243, the Supreme Court held that solvent credits were not assessable. This conclusion was deduced from an examination of the terms of the constitution itself and its policy as apparent upon the face of the instrument. The conclusion there reached is entirely at war with the conclusion reached in the *National Bank of Wellington* vs. *Chapman*. The Court there declared:

"Under the sections of the Revised Statutes which relate to the taxation of these latter class of banks (Section 2762 etc.) the shares are to be listed by the Auditor at their true value in money, *which necessarily demands the deduction of the debts of the bank, because the true value of the shares in money is necessarily re-*

duced by an amount corresponding to the amount of such debts."

Were this the correct rule, the decision of the Supreme Court in the *People* vs. *Hibernia Bank* would be erroneous. Were this the correct rule there would have been no occasion for the people of California to amend their constitution so as to authorize deduction of the amount of secured and unsecured debts. We say secured and unsecured debts for the reason that under the constitution a mortgage debt is made an independent assessable property, the amount of which is to be deducted from the assessable property of the mortgagor as well as the unsecured debt is to be deducted from the amount of the solvent credits of the tax payer. Upon the same principle the entire provisions of the revenue system of California upon this subject were entirely superflous and nugatory. Under the supposed rule the tax payer would be entitled to deduction of all his debts and liable to assessment only upon the net amount of the assessable value of his property. The Supreme Court of this State, however, held otherwise, and the people of California in view of that decision revised their organic law to conform thereto, declaring the rule to be as now ordained in that instrument and the statutes passed pursuant thereto.

Under no system of revenue with which we are acquainted is the assessor either bound or entitled to

enter into an accounting with a tax payer to ascertain not only how much property he has, but how much he owes, and deduct the one from the other in order to determine the proper amount in which to assess him.

Evidently, therefore, the *National Bank of Wellington* vs. *Chapman*, can afford no just authority for construction of the revenue system of this State nor aid in the solution of the question now before the Court.

We might point out between that case and the case at bar other important differences, but to do so would extend these remarks too much. We thus see the wisdom of the rule established by the Supreme Court of the United States declaring that decisions of the Supreme Court of the State as authority are controlling upon all questions of construction of the constitution and statutes of a state.

In this connection it may not be improper to add that the notice of the assessor addressed to the stockholders of complainant to appear and claim the benefit of such deductions as they might be entitled to, does not in the least affect the correct solution of the questions before the Court. The assessor was not authorized to give such notice, and notice when not authorized by law is purely gratuitous and nugatory. No person is bound to take notice of a notice not authorized by law.

In re Central Irrigation District, 117 Cal., 391.

These remarks equally apply to the position of counsel, that no solvent credits escape assessment under the constitution and laws of the State of California (p. 26). The position that "The stocks therefore under the California system of assessment as interpreted by her own courts stand for and represent the property of the corporation, and an assessment of the property is equivalent in law to an assessment of the stock" is incorrect.

The section of the Political Code (3608, Stats. 1881, 56,) the constitutionality of which was considered in *Burke* vs. *Badlam*, 57 Cal., 594, reads:

"Shares of stock in corporations possess no intrinsic value over and above the actual value of the property of the corporation which they stand for and represent, and the assessment and taxation of such shares and also of the corporate property would be double taxation. Therefore, all property belonging to corporations shall be assessed and taxed, but no assessment shall be made of shares of stock, nor shall any holder thereof be taxed therefor."

It will be observed that this statute does not declare that the actual value of the property of the corporation is the equivalent of the shares of stock of the corporation; on the contrary, all that it does say is that such shares possess no *intrinsic value* over and above the actual value of the property of the corporation. Intrinsic value and market value, intrinsic value and the

assessable value of property, (Pol. Code, Sec. 3617, Sub. 5th,) are widely different things. We have seen that the market value of stock may be par, may be above par, may be below par. The market value of the stock of the Bank of California, as agreed upon in one of these cases, was over $400 per share. This does not mean that the corporate property of the corporation is intrinsically worth that much. We all know that it means the efficient and successful handling of the corporate property of the corporation, as well as participation in enjoyment of the common prosperity of the country. Intrinsic value, therefore, is one thing; market value is another thing. The full cash value of this stock, or the amount at which the property would be taken in payment of a just debt due from a solvent debtor, might mean that the stock was worth $400 a share, whereas the intrinsic value of the corporate property of the corporation might not be fifty per cent. of the par value of the stock. The legislature, in this section, after making the declaration, lay down the rule that: "Therefore, all property belonging to corporations shall be assessed and taxed, but no assessment shall be made of shares of stock, nor shall any holder thereof be taxed therefor."

In *Burke* vs. *Badlam*, 57 Cal., 601, the Court held this rule constitutional, holding that "*To assess all of the corporate property of the corporation and also to assess each of the stockholders the number of shares held*

by him, would, it is manifest, be assessing the same property twice; once in the aggregate to the corporation, the trustee of all the stockholders, and again separately to the individual stockholders in proportion to the number of shares held by each;" but this is a widely different proposition from saying that shares of stock of the corporation equal or exceed the intrinsic value of the corporate property of the corporation. It is not an announcement that the one is the equivalent of the other. While to assess the stock in the hands of the stockholder and at the same time assess the corporate property of the corporation would undoubtedly constitute double taxation of the property, yet it is evident that this does not constitute a declaration that the one is the equivalent of the other. Hence the position of counsel is not tenable.

In the respects indicated and for the reasons already stated, we respectfully submit that the act of the legislature in question is unconstitutional and void, and that complainant is entitled to the relief prayed for in its bill.

Respectfully submitted.

T. I. Bergin,
Counsel for Complainant.

Dated Dec. 5, 1901.